515 B

25 pgs

(10)

No. 06-618

FILED
APR 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OFFICE OF SENATOR MARK DAYTON,
Appellant,

v.

BRAD HANSON,
Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBA CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*[1]

AARP is a nonpartisan, nonprofit membership organization of more than 38 million people aged 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports and defends the rights of older Americans and the laws and public policies designed to protect them. Approximately one half of AARP's members remain active in the work force and are covered by the federal laws protecting their fundamental civil rights in the work place including, *inter alia*, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. By enacting the Congressional Accountability Act (CAA) in 1995, Congress finally conferred the protections of these laws on thousands of congressional employees, none of whom had been previously covered. Congress' belated decision to extend civil rights protections to its employees more than thirty years after enactment of Title VII should be accorded great deference. Indeed, in enacting the CAA Congress specifically considered the question central to this case: whether the CAA violates the Speech or Debate Clause of the Constitution. Congress concluded that it does not because an employment decision is not a legislative act that would be protected by the Speech or Debate Clause. AARP files this brief *amicus curiae* in support of Appellee Hanson because the decision to work on behalf of the American people as an employee of the legislative branch of government in the

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[1] No counsel for any party authored any portion of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The written consents of the parties have been filed with the Clerk of the Court pursuant to SUP. CT. R. 37.2(a).

office of a member of the U.S. Senate or House of Representatives should not require an individual to forego the protections of the work place civil rights laws enjoyed by virtually all other American workers.

SUMMARY OF THE ARGUMENT

The CAA is a decision by Congress about how to regulate its own internal functioning. The Act and Congress's considered determination that it does not violate the Speech or Debate Clause is, therefore, entitled to significant deference. Indeed, to conclude that Congress's decision to subject its members to employment discrimination suits is barred by the Speech or Debate Clause is to force upon Congress an immunity that it decided was inapplicable and unnecessary.

Contrary to Appellant's argument, the decision of the Office of Senator Dayton to fire Hanson was not constitutionally privileged simply because Hanson's position was *related* to the legislative process. The Court of Appeals concluded instead that the privilege applies only to conduct that is "part of, or integral to, the due functioning of the legislative process." *Hanson v. Office of Sen. Mark Dayton*, 459 F.3d 1, 12 (D.C. Cir. 2006). In reaching this conclusion, the Court of Appeals rejected as erroneous its own analysis in a previous decision in which it concluded that an employment decision becomes part of the legislative process as a result of the employee's duties – the very argument that Appellant relies on here. Rather, the Court of Appeals rightly concluded that a decision to hire or fire any employee is simply an administrative act that legislators, judges, presidents, and private employers perform every day; it is not a legislative act protected by the Speech or Debate Clause.

I. THE COURT SHOULD DEFER TO CONGRESS'S DETERMINATION THAT THE CAA DOES NOT VIOLATE THE SPEECH OR DEBATE CLAUSE.

In enacting the CAA, Congress itself concluded that an employment action, such as firing a congressional aide, is a *not* a core legislative duty of a member of Congress protected by the Speech or Debate Clause. Appellant has identified no valid basis upon which this Court can reject this considered judgment.

This Court has stated that "[j]udging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that [a court] is called upon to perform.'" *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). The reviewing court must "afford the legislation great deference." *Oklahoma v. United States*, 161 F.3d 1266, 1269 (10th Cir. 1998). This is not simply a polite gesture, but "a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953).

"The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In this context, "the rational and practical force of the presumption [that a law is constitutional] is at its maximum." *Five Gambling Devices*, 346 U.S. at 449.

Congress clearly, and repeatedly, has concluded that the Speech or Debate Clause is no barrier to the application of federal laws to employment actions by members of the Legislative Branch. The Civil Rights Act of 1991, for example, subjects Congress to requirements similar to those created by the CAA. *See* 2 U.S.C. § 601 (applying Title VII of the Civil Rights Act of 1964 to Congress). During the debate over this Act, Senator Rudman raised a point of order that judicial review of Senate employment decisions would be unconstitutional under the Speech or Debate Clause. *See* 136 Cong. Rec. S9339-72 (daily ed. July 10, 1990) (statement of Sen. Rudman). The Senate overwhelmingly rejected the point of order, *id.*, and thereby took a firm position rejecting the argument that "Congress is limited by the Speech or Debate Clause in vesting jurisdiction in the Judicial Branch to rule on claims of employment discrimination." *Congressional Coverage Legislation, Applying Laws to Congress: Hearing on S.29, S.103, S.579, S.2071, S.2194 Before the S. Comm. on Govt'l Affairs*, 103rd Cong. 307 (1994) (Statement of Michael Davidson, U.S. Senate Legal Counsel).

In the 103rd Congress, a bipartisan committee, the Joint Committee on the Organization of Congress, was established, in part, to consider whether Congress should apply the laws it enacts to itself. During hearings on this issue, Senator Grassley testified that:

> I am of the view - shared by a research division of the Library of Congress, as well as a private law firm I asked to look into the issue several years ago - that we don't have speech and debate immunity for hiring and firing employees and for the conditions of our offices. These issues are not at the core of our legislative duties. A

> member of Congress should not receive special treatment if he or she does not follow civil rights or other labor laws.

Application of Laws and Administration of the Hill: Hearing Before the Jt. Comm. on Organization of the Cong., 103rd Cong. 25-26 (1993); *see also id.* at 35 (Rep. Fawell) ("I do not believe that the speech and debate clause of the Constitution, Article I, Section 6, prevents enforcement of Federal labor and/or civil rights laws on Members of Congress in their capacity as employer."). This conclusion was endorsed in the Joint Committee's Report. *See* H.R. Rep. No. 103-113, at 22 (1993).

The following year, three bills were introduced in the 103rd Congress concerning congressional accountability–H.R. 4822, S. 1824, and S. 2071. In the House debates on H.R. 4822, numerous Representatives, and a House Committee Report, expressly rejected the argument that congressional compliance laws were invalid under the Speech or Debate Clause. *See* 140 Cong. Rec. H7339 (daily ed. Aug. 10, 1994) (statement of Rep. Swett) (observing that H.R. 4822 addressed all constitutional concerns); *id.* at H7344 (statement of Rep. Rose) (bill did not run afoul of Constitution); *id.* at H7350 (Statement of Rep. Sanders) ("[T]he authors of the bill, and the committees which are bringing it to the floor, have worked long and hard to devise enforcement mechanisms which respect both the Constitution's provisions and the rights of workers, and I believe that they have succeeded."); *see also* H. Rep. No. 103-650, at 1, 3 (1994). The House adopted the bill, over constitutional objections, by a vote of 427 yeas to 4 nays. *See* 140 Cong. Rec. H7370 (daily ed. Aug. 10, 1994).

In the Senate hearings concerning S. 2071, the forerunner of the CAA, Senator Levin observed that Congress would make itself subject to federal labor laws "without violating the principle of separation of powers, or the Speech or Debate Clause." Congressional Coverage Legislation, supra, at 3. This sentiment was echoed in the testimony the Senate received from scholars and advocates. Professor Nelson Lund of George Mason University Law School, for example, testified that:

> The legal issue before this Committee then reduces to just one question: Are employment-related decisions–such as hiring and firing congressional aides, setting their pay scales, and regulating the sexual atmosphere of the workplace–part of the legislative process, or are they official but non-legislative administrative decisions?
>
> It seems to me that the answer is perfectly clear. Employment decisions can be very important in facilitating the legislative process, but they are not part of that process.

Id. at 243-44. Although this bill was scheduled for a vote in the Senate the vote never occurred. 141 Cong. Rec. S451 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman).

In the brief debate over the CAA itself, Representative Goodling included in the record a 1991 Congressional Research Service Report, which concluded that the Speech or Debate Clause would not bar a suit under the Act because "hiring and firing practices are not legislative within the meaning of the clause." See 141 Cong. Rec. H265 (daily ed. Jan. 17, 1995) (statement of Rep. Goodling). In

addition, Senator Lieberman directly addressed speech and debate immunity, stating that:

> an illegal employment action would not be regarded by the courts as an act that is legislative in nature . . . . of course, this is just common sense that the speech-and-debate clause on its face would not seem to be a clause that would make us immune from the impact of the laws we adopt and impose on all other employers when we are acting as employers instead of as Members of Congress involved in legislation.

141 Cong. Rec. S701, S702 (daily ed. Jan. 10, 1995) (statement of Sen. Lieberman).

The text of the CAA confirms that Congress considered the impact of the Speech or Debate Clause and concluded that the constitutional immunity it provides would not generally bar actions under the CAA. The text prohibits employment actions such as those alleged in this case. 2 U.S.C. § 1311(a)(3). At the same time, in the privileges and immunities section of the Act, Congress provided that the CAA's "authorization to bring judicial proceedings . . . shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representative under article I, section 6, clause 1, of the Constitution." 2 U.S.C. § 1413. These provisions reflect that Congress viewed the Speech or Debate Clause as wholly reconcilable with the prohibitions of the Act.

The House considered, debated and passed the CAA *unanimously* in a single day, and the Act passed the Senate in simply a week with only Senator Byrd voting against it. *See*

141 Cong. Rec. H286 (daily ed. Jan. 17, 1995) (unanimous House vote on S.2); 141 Cong. Rec. S767 (daily ed. Jan. 11, 1995) (Senate vote); *see also* 141 Cong. Rec. H104 (daily ed. Jan. 4, 1995) (unanimous House vote on H.R.1). In these circumstances, deference to Congress's judgment about the constitutional question is both necessary and appropriate. *See Rostker*, 453 U.S. at 64.

Judicial deference is particularly appropriate here because the CAA governs Congress's own ethical conduct, an issue over which Congress has wholly unfettered discretion. *See* U.S. CONST., art. I, § 5 (committing to the House and Senate the power to determine rules of conduct governing their members). The CAA does not diminish individual rights nor does it undercut the voters' choice of a representative; it threatens no power of the judicial or executive branch. Thus, to clothe employment decisions with the speech or debate immunity would "force upon Congress an immunity that Congress itself does not believe is needed to protect its own independence." Nelson Lund, *Congressional Self-Exemption From the Employment Discrimination Laws: A Rational Choice Analysis of the Civil Rights Act of 1991*, 54 LA. L. REV. 1559, 1583 (1994).

II. THE TEXT AND HISTORY OF THE SPEECH OR DEBATE CLAUSE, AS WELL AS THE CASE LAW INTERPRETING IT, DEMONSTRATE THAT THE CLAUSE IMMUNIZES ONLY ACTS IN THE FORMAL LEGISLATIVE PROCESS.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., art I, § 6, cl. 1. The text and history of this

Clause, as well as the case law interpreting it, demonstrate that it applies only to acts in the formal legislative process.

Thomas Jefferson long ago pointed out that "[the speech and debate privilege] is restrained to things done in the House in a Parliamentary course . . . For [the Member] is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty." T. Jefferson, A MANUAL OF PARLIAMENTARY PRACTICE (1800), *reprinted in* THE COMPLETE JEFFERSON 704 (S. Padover ed., 1943). Joseph Story wrote in his commentaries that "this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty." 1 J. Story, COMMENTARIES ON THE CONSTITUTION § 866, at 630 (5th ed. 1891).

This Court has similarly held that the Speech or Debate Clause immunizes only formal legislative acts. The immunities "were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). The Court's test for whether conduct falls within the Speech or Debate Clause is whether the act is:

> an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625 (1972). Only a "legislative act"–"an act generally done in Congress in relation to the business before it"–is immune from judicial review. *Brewster*, 408 U.S. at 512.

Applying this test, the Court has held that the Speech or Debate Clause immunizes "written reports presented in [the Congress] by its committees," "resolutions offered," and "the act of voting." *Kilbourn v. Thomson*, 103 U.S. 168, 204 (1880). Similarly, "a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." *Doe v. McMillan*, 412 U.S. 306, 312 (1973). In addition, "[a] Member's conduct at legislative committee hearings . . . may not be made the basis for a civil or criminal judgment against a Member." *Gravel*, 408 U.S. at 624. Finally, speech and debate immunity encompasses "[t]he power to investigate and to do so through compulsory process." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975). These are all "act[s] resulting from the nature and in the execution of the office." *Kilbourn*, 103 U.S. at 203.

Acts that do not rise to this level of formality, however, have been repeatedly held to fall outside the Speech or Debate Clause. For example, even though members of Congress are frequently "in touch with [and seek to influence] the Executive Branch of the Government . . . [this] conduct, though generally done, is not protected legislative activity." *Gravel*, 408 U.S. at 625. Nor does the Speech or Debate Clause protect the dissemination of legislative materials "to the public at large." *Doe*, 412 U.S. at 316; *see Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979). The Court has explained that these activities are "political in

nature rather than legislative." *Brewster*, 408 U.S. at 512.

Examining its own cases and broad rhetoric, the Court has concluded that the Speech or Debate Clause "reach[es] *only* those things 'generally *done in a session* of the House by one of its members in relation to the business before it,' *Kilbourn v. Thompson*, 103 U.S. at 204, or things 'said or done by him, *as a representative*, in the exercise of the *functions of that office*,' *Coffin v. Coffin*, 4 Mass 1, 27 (1808)." *Brewster*, 408 U.S. at 512-13 (emphasis added).

In *Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1302,1304 (10th Cir. 1994), *cert. denied*, 126 S.Ct. 396 (2005), a case brought under the CAA, the Tenth Circuit held that the Speech or Debate Clause bars judicial review of a Senator's allegedly discriminatory personnel decision only when the plaintiff's claim "question[s] the conduct of *official* Senate legislative business." (emphasis added). Indeed, in light of *Bastien*, the Court of Appeals in this case rejected its earlier holding in *Browning v. Clerk, U.S. House of Representatives*, 252 U.S. App. D.C. 241, 789 F.2d 923 (D.C. Cir. 1986), that the Speech or Debate Clause "protects those personnel decisions taken with respect to employees whose duties are 'directly related to the due functioning of the legislative process.'" *Hanson*, 459 F.3d at 11, quoting *Browning*, *id.* at 929.

Two years after *Browning* was decided, *Forrester v. White*, 484 U.S. 219 (1988), in which this Court concluded that a state court judge did not have absolute immunity from suit under 42 U.S.C. § 1983 for his decision to fire a subordinate court employee, cast doubt on *Browning*. Citing the narrowness of legislative immunity provided by the Speech or Debate Clause and presidential immunity under *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), *Forrester*

concluded that "judges are entitled to absolute immunity for 'judicial acts,' not 'administrative, legislative, or executive functions,' no matter how 'essential' such functions may be 'to the very functioning of the courts.'" *Hanson*, 459 F.3d at 7, quoting *Forrester*, 484 U.S. at 227, 228.

Citing *Forrester* and *Bastien*, the, the Court of Appeals concluded below that "an employee's duties are too crude a proxy for protected activity." *Hanson*, 459 F.3d at 11. The Court of Appeals pointed out that the "holding in *Browning* presumes that a personnel decision with regard to an employee whose duties are directly related to the due functioning of the legislative process . . . is always an integral part of the deliberative and communicative processes." *Id.* (Citations and internal quotation marks omitted). Relying on *Bastien*, the Court of Appeals rejected the presumption as "overinclusive and therefore inconsistent with the Court's practice of being 'careful not to extend the scope of the protection further than its purposes require.'" *Id.* Thus, "[w]hile there is no doubt a 'clear nexus' between a personnel decision involving an employee with legislative duties [as Appellant alleges Hanson's duties were] and the Member's 'ability to carry out his representative responsibilities effectively,' a 'nexus' alone is insufficient to trigger the protections of the Speech or Debate Clause." *Hanson*, 459 F.3d at 12 n. 20 (Internal citations omitted).

Rather, as the Court of Appeals correctly concluded, "[l]egislative immunity under the Speech or Debate Clause is limited to matters that are part of, or integral to, the due functioning of the legislative process." *Id.* at 12. Since it is not "necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation" of CAA, *id.* at 13 (Internal citations and quotation marks omitted),

Hanson's duties, even if they were "legislative" in nature, were not were not "part of, or integral to the due functioning of the legislative process" and, therefore, not protected by the Speech or Debate Clause. *Id.* at 12..

III. THE EMPLOYMENT ACTIONS COVERED BY THE CAA DO NOT FALL WITHIN THE SPEECH OR DEBATE CLAUSE.

Employment decisions covered by the CAA are not protected by the Speech or Debate Clause because, as this Court has made clear, the Speech or Debate Clause protects only acts in the formal legislative sphere–that is, acts "essential to the deliberations of the [Congress]." *Gravel*, 408 U.S. at 625. To be sure, "[e]mployment decisions can be quite important in facilitating the legislative process, but they simply are not part of it. Just like the gathering of documents for use in a congressional hearing, which the Court has said is outside the scope of the constitutional immunity, even the most important personnel decisions are simply a means of preparing for the legislative process." Lund, *supra*, at 1577. Indeed, personnel decisions are even more remote from the legislative process than gathering documents. Such decisions do not occur in or for a session of the legislative body; they do not become part of legislation; they do not impact the Congress as a whole. Rather, employment actions are part of the process of administering or managing an office. The fact that the management decision is made by a Senator or Representative is irrelevant; "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625.

Deciding to fire an employee is qualitatively different from voting on legislation, preparing a committee report,

questioning a witness at a hearing, making a statement on the Senate floor, or attempting to persuade another legislator to join your position. The latter acts all implicate "things generally done *in a session* of the [Congress] by one of its members *in relation to the business before it*," *Hutchinson*, 443 U.S. at 126 (emphasis in original, internal quotations and citation omitted), while employment decisions relate, at best, to the administration of a particular office. In addition, judicial review of employment decisions, unlike review of votes or reports, does not "threaten the integrity or independence of the [Congress] by impermissibly exposing its deliberations to executive influence." *Gravel*, 408 U.S. at 625. An employment decision, after all, does not implicate the reason for *legislation*, but the motive behind a single legislator's staffing decision.

Even if the employee is important to the legislator, the decision to hire or fire that employee is not, itself, part of the legislative process. This conclusion is compelled by the Court's decisions in *Brewster*, *Hutchinson*, *McMillan*, and *Johnson*. In these cases, the Court was asked to decide whether a legislator's communication with constituents or the Executive Branch fell within the Speech or Debate Clause. Although the communications in each case were crucial to the legislator's policy stance, they were held to be outside of the Speech or Debate Clause. *See Brewster*, 408 U.S. at 512-13; *Hutchinson*, 443 U.S. at 130; *McMillan*, 412 U.S. at 313-14, 317; *United States v. Johnson*, 383 U.S. 169, 172 (1966).

For these reasons, numerous academics considering whether congressional accountability laws are barred by speech and debate immunity have concluded that subjecting members of Congress to liability for their employment decisions would not run afoul of the Speech or Debate Clause. *See e.g.*, James J. Brudney, *Congressional*

Accountability and Denial: Speech or Debate Clause & Conflict of Interest Challenges to Unionization of Congressional Employees, 36 HARV. J. ON LEGIS. 1, 55-56 (1999) (concluding that speech and debate immunity should not bar actions under the CAA); Lund, *supra*, at 1577 (characterizing this issue as "just about as clear as it can be"); Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 107 (1994) (concluding that the CAA successfully responds to any constitutional concerns).

Finally, it is erroneous to presume that congressional immunity for personnel actions is necessary to avoid interfering with the legislative process–specifically, to prevent members of Congress from hesitating before hiring and firing key employees or becoming distracted or burdened by litigation. As an initial matter, this Court in *Forrester* has already rejected this rationale as a reason for extending absolute immunity to the employment decision of judges. *See* 484 U.S. at 229-30 (holding that this argument "in no way serves to distinguish judges from other public officials who hire and fire subordinates"); *See also Clinton v. Jones*, 520 U.S. 681, 708-09 (1997) (risk of vexatious litigation insufficient to immunize the President from suit during his tenure in office); *Burns v. Reed*, 500 U.S. 478, 494 (1991) (risk insufficient to immunize prosecutor). There is no reason to believe that this potential for "interference" with official duties has special force when applied to the Legislative, as opposed to Judicial or Executive, Branch.

In addition, this argument has already been addressed by Congress. The CAA contains numerous provision specifically designed to avoid causing vexatious litigation that unduly distracts or burdens member of Congress. For

example, before any suit may be commenced, the allegedly aggrieved employee must submit to mediation before the Office of Compliance–an independent, nonpartisan office within the Legislative Branch that administers and enforces the CAA. 2 U.S.C. § 1401. In addition, the employee must commence the proceeding against the *employing office* of the Senator, Representative or legislative instrumentality whose conduct is at issue, not the individual Senator, Representative or legislative officer. *Id.* §§ 1405(a), 1408(b). The CAA *does not* authorize an award of punitive damages or civil penalties. *Id.* § 1316(c). Finally, damages awarded or settlements paid under the CAA are funded by an account of the Office of the Treasury, not the individual congressman. *Id.* § 1415(a). Congress's careful reconciliation of the competing interests should be determinative of this particular argument about undue burdens. *See* 141 Cong. Rec. S444 (daily ed. Jan. 5, 1995) (statement of Sen. Grassley) (observing that these provisions were a compromise to assuage all doubts about CAA's constitutionality); *id.* at S452 (statement of Sen. Lieberman) (observing that these provisions were added in response to constitutional objections).

Indeed, this "legislative interference" argument is actually constitutionally backwards. The theory of the CAA is that "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch." 141 Cong Rec. H94 (daily ed. Jan. 4, 1995) (statement of Rep. Shays). The Act is designed to be "a reverse of the golden rule . . . . [The CAA] is saying let us do unto ourselves as we have done unto others." 141 Cong. Rec. S451 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman). Forcing legislators to comply with federal law, and potentially subjecting them to litigation for non-compliance, makes members of Congress better appreciate

the statutes they have passed and more, not less, likely to execute their constitutional functions in an informed and responsible manner. Thus, any potential the CAA has "to interfere" with a legislator's decision to hire and fire employees is a constitutional virtue of the Act, not a constitutional vice. *See* Lund, *supra*, at 1571-72.

No less than Thomas Jefferson and James Madison similarly observed that requiring Congress to live by its laws promotes democracy and the goals of the Constitution. Jefferson, in fact, opined that the Speech or Debate Clause was worded narrowly so that Congress could be held to its own laws:

> It was probably from [their] view of the encroaching character of privilege, that the framers of our constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged 'Senators and Representative' themselves from . . .'being questioned in any other place for any speech or debate in either House.'

T. Jefferson, A MANUAL OF PARLIAMENT PRACTICE, *reprinted in* Padover, *supra*, at 702. Similarly, in the Federalist No. 57, James Madison astutely observed that Congress must subject itself to federal laws to maintain the confidence of the people:

> [T]hey can make no law which will not have its full operation on themselves and their friends as well as on the great mass of the society. This has always been deemed one of the strongest

> bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.

THE FEDERALIST NO. 57, at 352-53 (James Madison) (Clinton Rossiter ed., 1961). To hold otherwise would wrongly frustrate Congress's constitutional regulation of itself.

CONCLUSION

For the foregoing reasons, this Court should conclude that employment decisions made by or on behalf of Members of Congress are not legislative acts immunized by the Speech or Debate Clause. It, therefore, does not bar jurisdiction of suits by congressional employees pursuant to the Congressional Accountability Act. Consequently, congressional employees can vindicate their work place rights in court like nearly all other American workers.

Dated: April 3, 2007

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